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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 220.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin, Appellant,

AGAINST

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellee.

BRIEF ON MOTION TO DISMISS APPEAL.

Statement.

This is a motion to dismiss the appeal now pending in this court from a final order and judgment of the United States District Court for the Southern District of New York dismissing the bill of complaint herein. The proceedings in the said District Court of the United States for the Southern District of New York leading up to said order and judgment and said appeal are set forth in the transcript of record in this Court in Francis Sherwood Male, as Trustee for Gilbert

W. Chapin, appellant, against The Atchison, Topeka and Santa Fe Railway Company, No. 220, October Term, 1915.

The ground for this motion is that the questions involved upon this appeal are moot questions and that the subject matter of the suit out of which this appeal arises cannot be affected by any declaration of this Court upon the principles or rules of law which the appellant seeks to have decided upon this appeal, for the reason that subsequent to the dismissal of the appeal herein by the lower court, the appellant, as plaintiff, instituted in the Supreme Court of the State of New York, County of New York, an action upon the same alleged cause of action against the same defendants, and that such action in the Supreme Court of the State of New York, County of New York, was heard and determined, and that a final judgment upon the merits therein was rendered dismissing the complaint filed in said action as against this appellee. The said action in the Supreme Court of the State of New York, County of New York, was commenced on or about the 1st day of May, 1914, and on or about the 20th day of June, 1914, the appellee demurred to the complaint in said action on the ground that said complaint did not state facts sufficient to constitute a cause of action as against the appellee. The issue of law arising upon the demurrer to the complaint having, upon motion of the appellant, been brought on for trial as a contested motion, and the appellant having moved for judgment upon the pleadings, an order was entered denying appellant's motion with costs; afterwards appellant's application for leave to amend his complaint was denied and upon appellee's motion an order was entered and filed in the office of the Clerk of the County of New York resettling the said prior order. Said order resettling the prior order denied appellant's motion for judgment on the pleadings, sustained the demurrer of the appellee, dismissed the complaint against the appellee with costs and ordered that final judgment be entered accord-

ingly ; on the 30th day of October, 1914, the final judgment upon the merits above referred to was entered in the office of the Clerk of the County of New York upon said order dismissing the complaint filed in said action as against this appellee.

ARGUMENT.

I.

The said judgment in the action in the Supreme Court of the State of New York, County of New York, is a final determination of the rights of the appellant and of the appellee which can be pleaded in bar to this suit.

Inasmuch as the judgment sustaining the demurrer to the complaint in the action in the Supreme Court of the State of New York, County of New York, did not give the appellant leave to amend his complaint, the judgment was a final judgment upon the merits and a conclusive determination as between the appellant and the appellee. It is settled by the decisions of this Court, as well as by the decisions of the Courts of the State of New York, that a judgment sustaining a demurrer, if it goes to the merits of the controversy, is as conclusive as an adjudication of the matter litigated as any other judgment (*Gould vs. Evansville, &c. R. R. Co.*, 91 U. S., 533 ; *Maldonado vs. Yglesias*, 162 App. Div., 1). Thus it has been held by this Court and by the Courts of the State of New York that a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless

leave to amend or plead over is granted (*Alley vs. Knott*, 111 U. S., 472 ; *Maldonado vs. Yglesias*, 162 App. Div., 1).

In *Alley vs. Knott, supra*, which was an action originating in the State of New York and involved the provisions of the Code of Civil Procedure of that State relating to demurrers, this Court said :

> " A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration, at common law and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action."

II.

The questions involved upon this appeal are moot questions since the said judgment of the Supreme Court of New York renders it impossible for this Court, if it should decide the pending appeal in favor of the appellant, to grant him any effectual relief.

If this Court should decide the questions involved in this appeal in favor of the appellant and it should therefore be established that the United States District Court for the Southern District of New York had jurisdiction over the suit out of which this appeal arises, still no effectual relief could

be granted to the appellant either by this Court or by the United States District Court for the Southern District of New York, since the judgment in the action in the Supreme Court of New York is a complete bar to the granting of any relief to the appellant. It is well settled by a long line of decisions of this Court that in a situation of this kind this Court will dismiss the appeal.

In *Kimball vs. Kimball*, 174 U. S., 158, a woman claiming to be the wife of a man supposed to have died intestate, filed a petition in the Surrogate's Court for Kings County, New York, for the revocation of letters of administration previously granted to his next of kin and for the granting of such letters to her. The Surrogate's Court dismissed the petition on the ground that a decree of divorce by the wife in another state from a former husband was void. She appealed from the judgment of dismissal to the highest court of New York, which affirmed that judgment. Pending a writ of error from the Supreme Court of the United States it was shown that a will of the deceased was proved in the Surrogate's Court after its judgment dismissing her petition and before her appeal from that judgment. It was held that the writ of error must be dismissed. The court in this case said :

> " The rule which must govern the disposition of this motion has been often stated and acted on by this court.
>
> " In a comparatively recent case, pending a writ of error to reverse a judgment for a railroad corporation in an action against it by a State to recover sums of money for taxes, it was shown that the defendant had made a tender of those sums to the State, and a deposit of them in a bank to its credit, which by statute had the same effect as actual payment and receipt of the money. Stipulations had been made in other similar cases that they should abide the judgment of this court in this case ; and the Attorney General of the State contended that a determination of the question whether the tax

was valid was of the utmost importance to the people of the State. But this court dismissed the writ of error, saying: 'The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard' (*California v. San Pablo & Tulare Railroad*, 149 U. S., 308, 314).

"Again, in a still more recent case, this court, upon a review of the previous decisions, said: 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from a judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal' (*Mills v. Green*, 159 U. S., 651, 653).

"From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence (*Dakota County v. Glidden*, 113 U. S., 222, 225, 226; *Mills v. Green*, above cited).

"The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to Federal questions only, as to a writ of error to a Circuit Court of the United States, on which the jurisdiction of this court extends to the whole case. The rule was applied to a writ of error to the Court of Errors and Appeals of the State of New Jersey in *Little v. Bowers*, 134 U. S., 547.

"In the present case, the subject matter of the petition to the surrogate's court, and the only relief which could be granted upon that petition, were the revocation of the letters of administration previously issued to the mother and the brother-in-law of the deceased, and the grant of new letters of administration to the petitioner. The decree admitting the will to probate, in terms, revoked the former letters of administration, and by its legal effect, superseded the necessity and the possibility of granting any letters of administration as of an intestate estate to the petitioner or to any one else. New York Code of Civil Procedure, §§ 2476, 2626, 2684. The whole subject matter of the writ of error is thus withdrawn, and the writ of error must be dismissed for want of anything upon which it can operate. *Chicago & Vincennes Railroad v. Fosdick*, 106 U. S., 47, 84; *San Mateo County v. Southern Pacific Railroad*, 116 U. S., 138; *Washington Market Co. v. District of Columbia*, 137 U. S., 62."

CONCLUSION.

It is respectfully submitted that the appeal pending in this court in the above-entitled suit should be dismissed with costs.

WALKER D. HINES,
Counsel for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1915—NO. 220.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,

Appellant,

against

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Appellee.

BRIEF FOR APPELLANT ON MOTION TO DISMISS THE APPEAL.

WILLIAM G. COOKE,
Counsel for Appellant.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 3377-78-79 Broad.

Supreme Court of the United States

OCTOBER TERM, 1915, NO. 220.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Appellant,

against

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Appellee.

BRIEF FOR APPELLANT ON MOTION TO DISMISS THE APPEAL.

The appellee now moves to dismiss the appeal upon the ground that, if the order appealed from should be reversed and the District Court held to have jurisdiction, a trial of the case would result in judgment for the defendant upon the plea of Former Adjudication.

FIRST.

Until the order appealed from is reversed, neither the District Court nor this Court will have any jurisdiction or power to pass upon the question which the appellee asks to have determined upon this motion.

It requires just as much jurisdiction to pass upon the plea of former adjudication as upon a plea of payment, usury, the application of a statute of limitations or any other matter of defense.

Nothing can be determined in the case while it is in its present condition, except the single question whether or not the case is before the court for any purpose whatsoever.

SECOND.

The question broached by the appellee upon this motion is one which cannot be determined until the case is actually at issue and the whole record, by which it is claimed that the appellant is estopped, is before the Court and the appellant has had an opportunity to avoid it.

I. An opinion as to the identical legal effect of two complaints, even though it be (as in this case) the opinion of one who claims to have been clerk in a law office for more than seven years, can hardly be deemed to take the place of the record which is supposed to contain the former adjudication.

II. If it should be found that the bill of complaint, now on file in the District Court, was in fact an exact copy of the pleading held insufficient by the state court; there is nothing to show that the bill could not be so amended as to obviate the objection. Assuming that the District Court would be bound by Judge Greenbaum's judgment, it would not be bound by his conclusion as to whether the facts stated in the application for leave to amend were sufficient to cure the defects in the pleading demurred to. It is not claimed that his denial of this application is a part of the record, nor does it appear what the facts so stated were.

When the proper time arrives we shall claim an absolute right to make such amendment to the bill now on file, as shall obviate the objection taken in the state court. This right is secured to us by Equity Rule 28.

We submit (1) that whether or not the appellant is estopped, can be made to appear only by an examination of the record by which it is claimed such estoppel is created, and (2) that if necessary, the bill can be so amended as to avoid the estoppel.

These are questions with which the court, at this stage, has nothing to do. The District Court has declined jurisdiction, thrown the case out, refused to have anything to do with it. And until that error is corrected, neither that court nor this will speculate upon the validity of the plea which defendant threatens to interpose, or as to whether it is probable that we have an adequate reply to it.

Kimball vs. *Kimball* (174 U. S., 155), cited by appellee, has no application. There a woman claiming to be the widow of an intestate decedent, had brought error to review a decree refusing to issue to her letters of administration. After the writ had issued, a will was found and probated. This Court dismissed the writ, because, even if the decree were reversed, no relief could possibly be granted to the plaintiff. The whole subject matter of the suit had been extinguished and there was nothing left to litigate about.

THIRD.

The motion should be denied.

WILLIAM G. COOKE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 220.

FRANCIS SHERWOOD MALE, AS TRUSTEE FOR GILBERT W. CHAPIN, APPELLANT,

against

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, APPELLEE.

AFFIDAVIT OF WILLIAM G. COOKE.

DISTRICT OF COLUMBIA,
City of Washington, ss:

William G. Cooke, being sworn, says:

I am one of the attorneys for plaintiff and counsel for the appellant in this case.

After reaching home from my office on the afternoon of Saturday, January 22, I was informed by telephone that defendant's attorney, having read my brief upon the motion

to dismiss the appeal, would, on this case coming on for argument, present to the court a certified copy of the complaint in the action in the State court referred to in the notice of motion. Therefore I beg leave to submit this affidavit as to the proceedings had in that litigation and as to certain of the circumstances attending it.

Suit was first brought in the United States District Court, but the suit was dismissed for want of jurisdiction by the order to review which this appeal is brought. It was because of the greater celerity of its procedure that that forum was chosen.

Plaintiff then sued in the Supreme Court of the State of New York, which suit the defendant moved to stay, on the ground that a suit for the same cause of action was pending in the Federal court. That motion was denied, not for the reason that the former suit had been dismissed, but because the defense of another action pending is not good where the two suits are in different jurisdictions.

Defendant then demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained and defendant had judgment thereon.

Plaintiff then brought another action, alleging in his complaint certain matters which his attorneys regarded as avoiding the objection made to the former complaint. A motion was then made to strike out such newly alleged matters as "immaterial, irrelevant, and redundant," the avowed purpose of such motion being to make the allegation of the second complaint correspond with those of the first, so that the decision in the first case would be *res adjudicata* in the second. The motion was granted, but, on appeal to the appellate division of the Supreme Court, the order striking out such allegations was reversed and the motion denied. Defendant then served an answer of about eighty typewritten pages.

The two complaints in the State court as well as that in the District Court were drawn from facts gathered from

various sources, and the allegations were almost entirely upon information and belief. But when I read the answer I saw that we had been altogether mistaken concerning many of the most essential facts of the case and I realized, from the things alleged and the confessions made, that plaintiff had, upon the conceded facts, a cause of action in addition to and beyond that claimed in the original complaint.

Therefore, within the twenty days allowed by the New York practice, we served an amended complaint, setting forth the facts as they are alleged in the answer. The case seems therefore to depend merely upon a question of law, and to this amended complaint the defendant has demurred. The demurrer is noticed for hearing on Tuesday, January 25.

Our cause of action is this: Plaintiff is the owner of 120 income bonds of $1,000 each, issued by the Atlantic and Pacific Railroad Company in 1880, maturing in 1910, the whole issue amounting to $12,000,000. Ahead of these bonds were $16,000,000 of first-mortgage bonds. All the bonds mentioned were issued under contract with the Atchison, Topeka and Santa Fe Railroad Company and entirely in that company's interest. The Atlantic and Pacific Company was little more than a name; it had at that time no railroad and its road was constructed, equipped, and operated by the Atchison company as a part of its line with the money realized from the sale of these two series of bonds, the Atchison company and another company under its control owning practically all the Atlantic and Pacific Company's stock. In 1895 the Atchison, Topeka, and Santa Fe Railroad Company was reorganized as the Atchison, Topeka and Santa Fe *Railway* Company, with the same stockholders and bondholders and with the same property, and without any notice to the creditors. The first-mortgage bonds had been guaranteed by the old company, in conjunction with the St. Louis and San Francisco Railroad Company, which the Atchison company controlled. Under the case of Northern Pacific Railroad

Company *vs.* Boyd (228 U. S., 482) the reorganized company was liable upon its predecessor's guarantee. In 1896 the first-mortgage trustee began a foreclosure suit, which proceeded to judgment. Thereupon the Atchison company bought up, for about $8,000,000, the bonds which had been thus guaranteed, paying about $500,000 cash and the rest in stock and bonds, and, claiming to have succeeded to the rights of the bondholders, under the doctrine of subrogation, forced on the sale and itself purchased the Atlantic and Pacific road, which is alleged to have been worth at that time $100,000,000. This property the Atchison company now claims to hold as its own free and discharged of the income bondholders' claim. The question in the case is whether the Atchison company was, in equity, entitled to be subrogated to the rights of the first-mortgage bondholders, as against creditors who had advanced their money to create this very property for the Atchison company's exclusive benefit.

The cause of action previously stated (as appears from Judge Ward's opinion below) "depends upon an equity arising out of fraud," the plaintiff claiming that the old Atchison company was the real owner of the Atlantic and Pacific company, and as such liable originally upon its bonds. It was this claim of ownership and the allegations of fraud which Judge Greenbaum held were not sufficiently stated to constitute a cause of action.

Whether the complaint in the present action in the State court or the bill on file in the District Court, as we propose to amend it, will be deemed to state facts sufficient to constitute a cause of action, or whether the decision rendered with respect to the sufficiency of the old complaint will be regarded as *res adjudicata* concerning the allegation contained in the new complaint, are matters which I believe this court will not determine before ascertaining whether it has any jurisdiction of the case for any purpose whatever.

WM. G. COOKE.

Subscribed and sworn to before me this 24th day of January, 1916.

[NOTARIAL SEAL.] WM. R. STANSBURY,
Notary Public, District of Columbia.

[Endorsed:] File No. 24,332. Supreme Court U. S., October term, 1915. Term No. 220. Francis Sherwood Male, as trustee, etc., appellant, *vs.* The Atchison, Topeka & Santa Fe Railway Company. Affidavit of William G. Cooke on behalf of appellant. Filed January 24, 1916.

FILED
JAN 5 1916
JAMES D. MAHER
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Supreme Court of the United States

OCTOBER TERM, 1915,

No. 220.

FRANCIS SHERWOOD MALE, as Trustee for GILBERT W. CHAPIN,

Appellant,

against

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Appellee.

APPELLANT'S POINTS.

WILLIAM G. COOKE,
Counsel for Appellant.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 1277-78-79 Broad.

Supreme Court of the United States

FRANCIS SHERWOOD MALE, as Trustee for GILBERT W. CHAPIN, Appellant, against THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellee.	October Term, 1915. No. 220.

APPELLANT'S BRIEF.

Statement.

Appeal from a decree of the District Court of the United States for the Southern District of New York, dismissing the bill of complaint herein for want of jurisdiction.

The bill was filed on the 12th day of January, 1914; the defendants being The Atchison, Topeka and Santa Fe Rail*way* Company, Atchison, Topeka and Santa Fe Rail*road* Company, Atlantic and Pacific Railroad Company and Boston Safe Deposit and Trust Company.

The relief prayed for is judgment for $120,000 and interest upon certain income bonds issued by the Atlantic and Pacific Rail Road Company on the 1st day of October, 1880, and maturing October 1, 1910, and for an adjudication that The Atchison, Topeka and Santa Fe Railway Company (the present appellee) is liable in equity for the amount of such judgment by reason of the matters set forth in the bill of complaint (Record, page 10).

Atchison, Topeka and Santa Fe Rail*road* Company, and Boston Safe Deposit and Trust Company are also named as parties defendant but neither has been served and it is doubtful whether they are necessary parties to the suit.

It is alleged in the bill that the defendant Atlantic and Pacific Railroad Company is practically out of existence, and has not been nor can it be served with process (page 9).

The subpoena was served upon the appellee, by exhibiting the original and delivering a copy to David L. Gallup, the Comptroller of the Company at No. 5 Nassau Street, in the City of New York on the 12th day of January, 1914 (page 2). Thereupon the appellee appeared specially and "for the single and sole purpose of making a motion to set aside the service of the subpoena and to dismiss the bill of complaint therein as to said defendant The Atchison, Topeka and Santa Fe Railway Company with costs, for want of jurisdiction of the person of the said defendant" (page 17).

Plaintiff is a citizen of the State of New York.

Defendant Atchison, Topeka and Santa Fe Rail*road* Company is, or was, a Kansas corporation.

Atlantic and Pacific Railroad Company is, or was, a corporation created by Act of Congress.

Boston Safe Deposit and Trust Company is a Massachusetts corporation (page 3).

The appellee is also a corporation organized under the Laws of the State of Kansas and was served with original process in the State of New York, where its affairs were conducted and its officers could be found (page 28).

Having thus been served, the appellee moved, upon an order to show cause granted February 17, 1914, to dismiss upon the ground:

> "That this suit is improperly and collusively brought by the alleged plaintiff, in violation of Sections 37 and 51 of the Judicial code, in that the jurisdiction of this court for the Southern District of New York over this cause being dependent on diversity of citizenship of the plaintiff and defendant and the residence therein of one of the said parties, and that said defendant The Atchison, Topeka and Santa Fe Railway Company, a corporation created by and existing under the laws of the State of Kansas and being a citizen and resident of the State and District of Kansas, and not being a citizen or resident of the State of New York or of the Southern District thereof, Gilbert W. Chapin, who is a citizen and resident of the State and District of Connecticut, and not a citizen or resident of the State of New York or of the Southern District thereof, and who as appears from the bill of complaint is the real owner of the income bonds of the Atlantic and Pacific Railroad Company referred to in the bill of complaint herein, and therefore the real party plaintiff in interest, transferred and assigned said bonds to Francis

> Sherwood Male as trustee, the alleged plaintiff in this suit who is alleged to be a citizen and resident of the State of New York and of the Southern District of New York, for the sole purpose of enabling suit on said bonds to be brought in this District Court for the Southern District of New York" (page 20).

The District Court granted the motion and "dismissed the bill for want of jurisdiction without costs and without prejudice" (page 30).

The same Judge afterward allowed an appeal to this Court from such decree, upon the question of jurisdiction only (page 31).

We do not deny that the bonds in suit had belonged to Gilbert W. Chapin, a citizen of Connecticut, who assigned them to the plaintiff in trust, in order that suit might be brought upon them in the Southern District of New York, where service could be made upon the appellee.

POINTS.

FIRST.

The provisions of statute invoked by defendant have no application to a case where there was Federal jurisdiction before the assignment.

Those provisions are as follows:

Section 37 of the Judicial Code requires the District Court to dismiss any suit in which it shall appear that it does not "really and substantially involve a dispute or controversy properly within

the jurisdiction of said District Court or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter."

The order appealed from was made upon the supposition that it appeared that Male had been "improperly or collusively" made party plaintiff to the suit "for the purpose of creating a case cognizable" by the Court below.

We submit that an altogether erroneous meaning has thus been attributed to the Act. To us it seems clear that the legislative purpose was simply to restrain such transfers of interest as would create a diversity of citizenship, where none had existed before, and where circumstances showed that the transfer was collusive or otherwise improper. The section in question cannot be made to apply to a case where the diverse citizenship already existed and the Federal jurisdiction was complete before the assignment. The improper or collusive design which the Court is empowered to frustrate is, not that of bringing suit in one particular district rather than another, but of *creating a case* cognizable in the United States Courts.

The assignment by Chapin to Male, however improper or collusive it may have been, did not *create a case* of Federal cognizance; that was done by the framers of the Constitution in 1789. But we are at a loss to conjecture what element of collusion or impropriety can be found in the assignment of a chose in action, by a citizen of one State to a citizen of another, where both such States are different from that of the defendant's citizenship, although the purpose may be to facili-

tate the bringing of suit in a State where the defendant can be served with process.

It is well settled that, even where diversity of citizenship is created by an assignment, the mere fact that the purpose was to make the case one of Federal cognizance, is no evidence of such impropriety or collusion as will justify a dismissal of the complaint.

> *Crawford* vs. *Neal*, 144 U. S., 585;
> *South Dakota* vs. *North Carolina*, 192 id., 286;
> *O'Neil* vs. *Walcott Co.*, 174 Fed., 527 (Cir. Ct. of App.).

So we see from these decisions what is quite obvious from a mere reading of the Act, that Section 37 does not authorize a dismissal of the complaint, simply because "parties to the suit have been * * * made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter." But it must appear that the thing has been done *"improperly or collusively."* These words imply some element of fraud or corruption which cannot be taken for granted. It must be proved, and the *onus probandi* is upon the party alleging it. In the case at bar there is not a vestige of evidence that the assignment made was improper or collusive; all that the Court below had before it was the case of an owner of a cause of action of Federal cognizance, transferring it, not improperly or collusively, but openly and in the exercise of a property right which no Legislature or Court can take away, and for an entirely proper and lawful purpose. We submit that the order appealed from is wrong.

The precise question seems not to have been passed upon by this Court or in the Circuit Court of Appeals, but all the reported *nisi prius* decisions, which we have been able to find, are in support of plaintiff's contention.

In *Portage Water Co.* vs. *City of Portage* (102 Fed., 771), Judge Bunn, in the Western District of Wisconsin, says:

> "The purpose of the law was to prevent colorable assignments for the purpose of giving jurisdiction by payees or contractees who were citizens of the same State with the other contracting party. But this purpose does not hold where, by the original contract, the suit might be brought in the Federal Court."

In *Bolles* vs. *Lehigh Valley R. R. Co.* (127 Fed., 884), a West Virginia corporation assigned its cause of action to a citizen of New York, who brought suit in the Southern District against the defendant, a Pennsylvania corporation. Precisely the motion that has been made here was made there and denied by Judge Coxe, who says:

> "This controversy was one of Federal cognizance as it existed between the original parties. The statute could hardly have intended to deny jurisdiction simply because the venue is laid in a different district from the one which would have been selected had no assignment been made."

Stimson vs. *United Wrapping Machine Co.* (156 Fed., 298) was a motion to remand to the State Court. The material facts were the same as here

and in the *Bolles* case. Judge Hazel, in the Western District of New York, denied the motion on the ground that the assignor could have sued in the Federal Court in his own State.

The decision in *Consolidated Rubber Tire Co.* vs. *Ferguson* (183 Fed., 756) is referred to by the learned Judge in the Court below, as sustaining his views, but we submit that it has no application. There an *alien* had assigned to a citizen of New York, a cause of action against a citizen of New Jersey, and the Circuit Court of Appeals held that the District Court for the Southern District of New York had no jurisdiction. The ground taken was that under the statute, the Federal Courts will not take cognizance of certain suits in favor of any assignee "unless such suit might have been prosecuted in such Court, if no assignment or transfer had been made."

It will be observed that the effect of this law upon an assignment made by a citizen, is different from that upon one made by an alien. The former has a general right of resort to the Federal Courts; he may sue in his own State or his claim may be prosecuted in any State of which his assignee may be a citizen, so long as both are different from the State of defendant's citizenship; but the right of an alien to sue is restricted to the Federal Court of defendant's citizenship. He must sue there or he cannot sue at all. Therefore, in the case cited, the suit before assignment could not have been prosecuted in the *Federal Court*, but only in the Federal Court *for New Jersey.*

We submit that our case and the one cited are altogether unlike.

SECOND.

Plaintiff, as trustee, is the legal holder and owner of the bonds, so that it is his citizenship and not that of the beneficiary, which determines the State in which suit must be brought.

The instrument creating the trust (Record, page 27) assigns and transfers all the right, title and interest of Chapin in the bonds to Francis S. Male "in trust nevertheless for the following uses and purposes, namely, to collect the rents, issues, income, profits or principal of said bonds for my use, with full power and authority in his name, as trustee, to institute, maintain or carry on any suit, action or proceeding to collect * * * any money or moneys due or which may hereafter become due * * * on said bonds."

It will be observed that the duties imposed upon Male by this instrument were active and constituted him the trustee of an express trust.

By the laws of New York, and, so far as we know, by those of every other State, the trust thus created is valid and vests in the trustee the whole legal title and right of possession, subject only to the beneficiary's right to enforce performance of the trust.

> "Trusts of personal property are not fettered by the limitations prescribed for trusts of real estate. They may be created for any purpose not unlawful, subject only to the law of perpetuity. The title to personal property given in trust, vests in the trustee for the pur-

poses of the trust and continues in him until those purposes are accomplished."

Cochrane vs. *Schell*, 140 N. Y., 534.
Gott vs. *Cook*, 7 Paige, 521;
Gilman vs. *McArdle*, 99 N. Y., 451.

The indenture reserves no power of revocation in the grantor; but even if it had, that circumstance would not have invalidated the trust or affected the trustee's title or right of possession.

It was so held in a case where a written assignment in trust of 400 shares of railroad stock contained the following provision:

"The right to cancel or otherwise modify this instrument at any and all times is hereby expressly reserved to me, notwithstanding any provision herein contained."

Locke vs. *Farmers L. & T. Co.*, 140 N. Y., 135.

The same rule was applied where there was a declaration of trust in the following words:

"Received of my father, James Mac Kaye, ten Kansas Pacific bonds of one thousand dollars each, to be held by me in trust for his adopted daughter Theodora Edith Mac Kaye and for her sole benefit and behoof, said bonds for and during his life to be subject to the order of my father."

Von Hesse vs. *Mac Kaye*, 136 N. Y., 115.

The right of a trustee of an express trust to sue in his own name, in the State of New York, is fixed by statute.

Code of Civil Procedure, Sec. 449.

That a trustee may sue in the Federal Court of the State of which he is a citizen, without reference to the place of the beneficiary's citizenship, is no longer an open question.

In *Mexican Cent. R'y Co.* vs. *Eckman* (187 U. S., 429), one Huesselmann, an infant, whose parents, as well as he, were residents and citizens of Illinois, had been injured in Mexico through the negligence of the Railway Company, in whose employ he then was. The railway was a Massachusetts corporation. Eckman, a citizen and resident of Texas, was appointed Huesselmann's guardian and brought suit in his own name in the United States Circuit Court for the Western District of Texas, to recover damages for the ward's injuries. Although the report does not mention the fact, it is obvious that the reason why a citizen of Texas was selected for appointment as guardian, was that the railway carried on its operations in that State, so that it could be served with process there, which probably could not have been done in Illinois. The case came here upon a certificate of the Circuit Court, for a determination of the question whether or not the guardian could sue in his own name in Texas, while his ward was a citizen of Illinois and the defendant a citizen of Massachusetts. Held that the guardian might have so sued in the State Courts of Texas, and could consequently do so in the Federal Court.

In *Dodge* vs. *Tulleys* (144 U. S., 451), Mr. Justice Brewer says:

> "Another defect claimed is that the citizenship of Hesse, the obligee in the bond, is not alleged; but this is unnecessary. The suit is in the name of Tulleys, trustee, to whom the legal title was conveyed in trust, and who was therefore the proper party in whose name to bring suit for foreclosure. It happens in this case that there was but one party beneficiary under the trust deed; but it often happens, as in railroad trust deeds, that the beneficiaries are many. But whether one or many, the trustee represents them all, and in his name the litigation is generally and properly carried on. The fact that the beneficiary in a trust deed may be a citizen of the same State as the grantor does not, if the trustee is a citizen of a different State, defeat the jurisdiction of the Federal Court" (pages 455-6).

In *Johnson* vs. *City of St. Louis* (172 Fed., 31) the Circuit Court of Appeals (8th Circuit) held that:

> "A citizen of one State, who holds the title to property in trust for others, may maintain an action for damages to it, against a citizen of another State, in the proper Federal Court, without regard to the citizenship of his *cestui que trust*."

In *New Orleans* vs. *Gaines' Admrs.* (138 U. S., 606) Mr. Justice Bradley, in delivering the Court's opinion, said:

> "We have repeatedly held that representatives may stand upon their own citizenship in

> the Federal Courts, irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc."

The assignment by Chapin to Male in trust was, therefore, valid; a complete transfer of the title and right of possession, which entitled the assignee to sue in his own name in the State of his domicile.

It follows that the suit is one between a citizen of New York and a corporation organized under the laws of Kansas, so that it is a case of Federal cognizance.

THIRD.

We submit that the District Court had jurisdiction of the suit, and that the order dismissing the complaint should be reversed, with costs.

WILLIAM G. COOKE,
Of Counsel for Appellant.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 220.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Appellant,

against

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLEE.

WALKER D. HINES,
Counsel for Appellee.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1915. No. 220.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin, Appellant,

AGAINST

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellee.

BRIEF ON APPEAL.

Statement.

This is an appeal from a final order of the United States District Court for the Southern District of New York, dismissing the bill of complaint herein on the ground that the Court had no jurisdiction of the suit. This suit was commenced in the District Court for the Southern District of New York by the appellant, alleged to be a citizen and resident of the State of New York, suing as assignee or transferee in trust for the benefit of Gilbert W. Chapin, alleged to be a citizen and resident of the State of Connecticut, by the service of the subpœna and bill of complaint upon The Atchison, Topeka and Santa Fe Railway Company, a corporation organized under the laws of the State of Kansas. The bill of complaint also named as parties defendant Atchison,

Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company, alleged in the bill of complaint to be a corporation created by an Act of Congress prior to the first day of January, 1872, and Boston Safe Deposit and Trust Company (Rec., fol. 5).

The appellee appeared specially and moved that the subpœna and service thereof be set aside and the bill of complaint dismissed as to the appellee on the ground of want of jurisdiction of the suit and the court below dismissed the bill of complaint on that ground (Rec., fols. 15, 38). In the certificate of jurisdiction to this court, filed in the court below, Hon. H. G. WARD, Circuit Judge, certified

> " that the order, judgment or decree of dismissal herein is based solely on the ground that the Atlantic and Pacific Railroad Company, one of the defendants herein, being a corporation created by the laws of the United States, a suit on its bonds arises out of a law of the United States and that this Court has no jurisdiction thereof because the Atchison, Topeka and Santa Fe Railway Company, the only defendant served herein, is not an inhabitant of the Southern District of New York; and on the further ground that the title to the bonds involved in this suit was transferred for the sole purpose of making this cause cognizable in a Federal Court and for the purpose of giving the United States District Court in and for the Southern District of New York jurisdiction thereof; and on the further ground that neither the plaintiff nor the defendant, the Atchison, Topeka and Santa Fe Railway Company, resides in this district. And acting also independently of the motion made herein by the Atchison, Topeka and Santa Fe Railway Company, and on the court's own motion, this suit is dismissed only for the reasons above stated " (Rec., fol. 45).

Some time prior to October 18, 1913, Gilbert W. Chapin contemplated the bringing of a suit in equity in the District

Court for the District of Connecticut against the appellee and the other corporations named as defendants in this suit and a printed bill of complaint was prepared to that end. On or about October 18, 1913, Mr. Chapin's solicitors who now represent the appellant, requested the appellee to enter an appearance in the contemplated suit in Connecticut, but the appellee refused to do so. The bill of complaint in the contemplated Connecticut suit undertook to set up in Gilbert W. Chapin the same alleged cause of action which the appellant undertakes to set up in this suit, and was identical with the bill in this suit, except for certain typewritten additions and modifications in the bill of complaint herein which were made necessary by the change of the party plaintiff and by the change of the venue from the District of Connecticut to the Southern District of New York (Rec., fols. 25-28). Gilbert W. Chapin, who is admitted by the bill of complaint to be the real owner of the income bonds upon which this suit is based, is alleged to be a resident of the State of Connecticut and Francis Sherwood Male, the nominal plaintiff, is alleged to be a resident of the State of New York (Rec., fols. 5, 9). The affidavit of Howard O. Wood, one of the solicitors for the appellant (Rec., fol. 34), presented in the court below in opposition to appellee's motion, stated that

> " he " (Gilbert W. Chapin) " and deponent, as his counsel, being desirous of avoiding the unsatisfactory process of trying a cause and conducting a litigation at and from a great distance determined upon the conveyance in trust aforesaid, so as to secure the benefits, advantages and convenience of a trial and hearing in this district."

ARGUMENT.

I.

The lower court properly dismissed the suit because (a) the suit did not really and substantially involve a controversy within the jurisdiction of the lower court, and (b) the appellant was improperly and collusively made a party to create a case having the appearance of being cognizable in the lower court.

The record shows conclusively that the so-called assignment and transfer by Gilbert W. Chapin to Francis Sherwood Male as Trustee for himself, of the income bonds of the Atlantic & Pacific Company involved in this suit, were made solely for the purpose of enabling suit to be brought in the United States District Court for the Southern District of New York (Rec., fols. 25-28, 33-35). Indeed it is admitted in appellant's brief (p. 4) that "the bonds in suit had belonged to Gilbert W. Chapin, a citizen of Connecticut, who assigned them to the plaintiff in trust, in order that suit might be brought upon them in the Southern District of New York where service could be made upon the appellee."

Section 51 of the Judicial Code reads in part as follows:

> "* * * and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

If, as contended by appellant, the federal jurisdiction of the cause of action sued upon is founded on the fact that the

action is between citizens of different states, the situation, prior to Chapin's assignment to appellant, was that Chapin had a cause of action against the appellee and that suit thereon could be brought in the federal court only in the district of Connecticut or in the district of Kansas. Chapin failed in his effort to get the appellee to enter its appearance in such a suit in the district of Connecticut. Thereupon he decided, the statutes of the United States to the contrary notwithstanding, to take steps which would make it practicable for the action to be maintained in his interest in the Southern District of the State of New York, and consequently made the assignment " in order " as stated by appellant's counsel in his brief, " that suit might be brought upon them (the bonds) in the Southern District of New York where service could be made upon the appellee." Chapin did this, as explained by the affidavit of appellant's counsel " so as to secure the benefits, advantages and convenience of a trial and hearing " in the Southern District of New York. Certainly such " benefits, advantages and convenience " could not be so characterized from the standpoint of the lower court or from the standpoint of the defendant and were not recognized or provided for by the statute. The lower court held that the suit must be dismissed under section 37 of the Judicial Code, reading as follows:

> " If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the

> suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

We contend that the facts show that this suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court," *i. e.*, the District Court for the Southern District of New York, and hence, irrespective of any improper or collusive making of parties, the suit was properly dismissed. But we also contend that the suit was properly dismissed under the further language of the section dealing with the improper making of parties for the purpose of creating a case cognizable under the law.

We submit that either the case upon which appellant sues is Chapin's case or it is a different case. If it is Chapin's case then Chapin is the real plaintiff and the lower court did not have jurisdiction. If this is a different case, then it is a case which avowedly was created so that it would be cognizable in the Federal courts to the end that action thereon might be maintained in the lower court, and this action was improper and collusive because it must be improper and collusive for a litigant for his personal convenience to make an assignment of a claim in which he retains the entire beneficial interest for the sole purpose of imposing the burden of trying that case upon a Federal court in which the statutes declare the suit shall not be brought.

The precise question here involved, whether, where a controversy exists between a citizen of one State and a citizen of another State, there may be made at the plaintiff's option and for his sole convenience a purely nominal assignment so that suit may be brought against the defendant in some other district in the United States where service of process can be obtained upon the defendant, appears never to have been raised either in this court or in the lower courts. But a negative answer to the question seems to be required

by the language of the statute and by its purpose, and is consistent with the expressions of this court and of the lower courts upon related questions.

Appellant's brief contends that Section 37 of the Judicial Code has no application to a case where there was diversity of citizenship before the assignment and to this point cites *Portage Water Company vs. City of Portage* (Cir. Ct., W. D. Wisconsin, 1900); *Bolles vs. Lehigh Valley R. R. Co.*, 127 Fed., 884 (Cir. Ct., S. D. N. Y., 1904), and *Stimson vs. U. S. Wrapping Machine Co.*, 156 Fed., 298 (Cir. Ct., W. D. N. Y., 1907). These were all cases decided under Subdivision 1 of Section 24 (not Section 37) of the Judicial Code, providing as follows:

> "No District Court shall have cognizance of any suit (except for foreign bills of exchange) to recover upon any promissory note or other choses in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been presented in such court to recover upon said note or other choses in action if no assignment had been made."

These cases are directly in conflict with later decisions arising under the same provision as follows:

Consolidated Rubber Co. vs. Ferguson, 183 Fed., 756 (Cir. Ct. of Appeals, S. D. 1910);
Waterman vs. Chesapeake & O. Ry. Co., 199 Fed., 667 (Dis. Ct., Dist. N. J., 1912);
Bison State Bank vs. Billington, 209 Fed., 610 (Cir. Ct. of Appeals, 5th Cir., 1913);
Cincinnati H. & D. Ry. Co. vs. Orr, 215 Fed., 261 (Dis. Ct., E. D. N. Y., 1914).

In the case of Consolidated Rubber Company vs. Ferguson, *supra*, the plaintiff was a citizen of New York and claimed under an assignment from a British corporation. The defendant was a New Jersey corpora-

tion. The Circuit Court of Appeals for the Second Circuit there held that although by reason of the existence of diversity of citizenship of the assignor of the claim sued upon and of the defendant suit could have been brought in some Federal district, the assignee could not sue in the Southern District of New York where his assignor could not have sued as a matter of right in the same district. The court did not rely upon any distinction between an alien assignor and an assignor who is a citizen of another State and it is submitted that there exists no valid distinction in this respect.

In appellant's brief the contention is also made that

> "it is well settled that even where diversity of citizenship is created by an assignment the mere fact that the purpose was to make the case one of Federal cognizance, is no evidence of such impropriety or collusion as will justify a dismissal of the complaint",

and to sustain this proposition the cases of *Crawford vs. Neal*, 144 U. S., 585, *South Dakota vs. North Carolina*, 192 U. S., 286; *O'Neil vs. Wolcott Company*, 174 Fed., 527 (C. Ct. of Appeals) are cited. These cases do not sustain this proposition.

In *Crawford vs. Neal*, *supra*, the complainant who had removed his suit to the Circuit Court of the United States from a State court claimed as the assignee of two judgments. This court there ruled that: "if the transfers of the judgments to the complainant were fictitious, the plaintiffs therein continuing to be the real parties in interest and the complainant but a nominal or colorable party, *his name being used only for the purpose of jurisdiction, then the objection to the jurisdiction of the Circuit Court would be well taken;* but if the transfers were absolute and the judgment creditors *parted with all their interest for good consideration*, then the mere fact that one of the motives of the purchase may have been to enable

the purchaser to bring the suit in the United States Court would not be sufficient to defeat the jurisdiction."

So in *South Dakota vs. North Carolina, supra*, the Court quoted with approval from *Dickerman vs. Northern Trust Co.*, 176 U. S., 181, as follows: "Thus it is well settled that *a mere colorable conveyance of property for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal Court will not confer jurisdiction:* but if the conveyance appear to be a real transaction the Court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance."

So in *O'Neil vs. Wolcott Company, supra*, the Court said: "The fact that the purpose to bring a cause of action within the jurisdiction of a federal court is the motive which induces a gift or a sale, and a conveyance of a cause of action or of the property out of which the cause of action arises, does not deprive the assignee of his right to invoke the jurisdiction of that Court to determine the cause, *provided the transfer was real and absolute.*"

The reasoning of the foregoing authorities clearly sustains the action of the lower Court.

Appellant also contends that a Trustee may sue in the Federal Court of the State of which he is a citizen without reference to the place of the beneficiary's citizenship, and on this point relies in his brief (p. 11 *et seq.*) upon the cases of *Mexican Central Railway Company vs. Eckman*, 187 U. S., 429; *Dodge vs. Tulleys*, 144 U. S., 451; *Johnson vs. City of St. Louis*, 172 Fed., 31; *New Orleans vs. Gaines' Adminstr.*, 138 U. S., 606.

In *Mexican Central Railway vs. Eckman, supra*, and in New Orleans vs. Gaines' Admntr., *supra*, this Court expressly made a distinction between a trustee to whom an assignment has been made by operation of law and a trustee to whom a simulated voluntary assignment has been made. Thus in *Mexican Central Railway Co. vs. Eckman* this court quoted

the language of Mr. Justice BRADLEY in *New Orleans vs. Gaines' Administrator* to the following effect:

> "we have repeatedly held that representatives may stand upon their own citizenship in the Federal Courts irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers, etc. *The evil which the law was intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments.* But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law."

In *Dodge vs. Tulleys, supra*, and *Johnson vs. City of St. Louis, supra*, cited by counsel for the appellant, were involved *bona fide* trust deeds executed by third persons to the plaintiff trustee for the benefit of the beneficiaries and no question as to merely nominal or collusive assignments was raised.

Appellant's counsel tries to prove that the assignment made by Chapin to the appellant was not improper and collusive because when the jurisdiction was challenged the appellant's counsel disclosed the facts, but the fact that appellant, after his improper action was challenged, caused the truth to be told about what he had done instead of attempting to get the court to believe a false statement on the subject certainly has no bearing upon the impropriety or collusiveness of his effort.

If appellant's contention is correct, any controversy between a citizen of one State and a citizen of another will be cognizable not only in the districts of the residences of the plaintiff and of the defendant as provided by law, but will also be cognizable, at the option of the plaintiff and for his exclusive convenience, in any other district in the United States which he may choose to select and in which he may succeed in obtaining service of process upon the defendant. This view will open wide possibilities for experimenting upon

the courts and for imposing unreasonable burdens upon defendants; and it is believed that these are two of the evils which were sought to be avoided by the statute which Chapin and the appellant have tried to circumvent.

II.

The lower Court had no jurisdiction over the person of the appellee, because this suit is one necessarily arising under the laws of the United States, and the appellee being a resident and inhabitant of the State and district of Kansas and not being a resident or inhabitant of the State of New York is not suable in the Southern District of New York.

(1) *This suit is one necessarily arising under the laws of the United States since the validity of the income bonds of the Atlantic and Pacific Railroad Company, a Federal corporation, is an essential ingredient of the appellant's cause of action against the appellee.*

The bill of complaint herein shows that the defendant the Atlantic and Pacific Railroad Company is a corporation created by an Act of Congress (Rec., fol. 5), and, besides, this is a fact of which this Court will take judicial notice. While this suit as against the appellee is not a suit upon these bonds, yet any cause of action which may be deduced from the bill of complaint against the appellee necessarily presupposes the establishment of the proposition that the bonds involved in this suit are valid claims against the Atlantic and Pacific Railroad Company. Therefore, this suit, under any

possible theory of the bill of complaint, necessarily involves the validity of obligations of a Federal corporation and therefore arises under the laws of the United States.

In *Osborne vs. Bank of the United States*, 9 Wheaton, 738, was involved the right of the Bank of the United States, a corporation created under an Act of Congress, to sue in the circuit courts of the United States. Mr. Chief Justice MARSHALL, delivering the opinion of the court in that case, said :

> " When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. * * * The question forms an original ingredient in every cause. Whether it be, in fact, relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involved, then, must determine its character, whether those questions be made in the cause or not."

In *Oregon vs. Three Sisters Irrigation Co.* (C. C. Ore., 1907), 158 Fed., 346, the Court refused to remand a suit by the State of Oregon to cancel a reclamation contract between it and the defendant entered into in pursuance of the Act of Congress known as the Carey Act, which authorized the State to enter into reclamation contracts.

The Court, after critically examining the development of

the rule as to cases arising under the laws of the United States, said (p. 350):

> "All has proceeded in pursuance of the Act of Congress, and the litigation arises upon an instrument which is the result of such a proceeding. It seems perfectly clear and consequential, therefore, that the suit has grown out of the legislation or a law of Congress. True, the especial grievance complained of is the alleged breach of the contract, and it might be that the ultimate issue would simply resolve itself into one of fact as to whether the defendant had complied with the stipulations of the agreement. But such stipulations are essentially obligations to comply with the provisions of the Carey Act, and the suit is nevertheless one touching the right or privilege of the complainant accorded under the act, and the act itself is certainly involved by the litigation. It is hardly possible that the state can maintain its rights and privileges thus granted without in some way calling to its aid some, if not many, of the provisions of the Act, and drawing into controversy the proper interpretation and rendering of such provisions."

In *Washington and Idaho Railroad Company vs. Cœur d'Alene Railroad Company*, 160 U. S., 77, it was held that a suit involved a Federal controversy as to both defendants on the ground that one of those defendants was a Federal corporation, although the Federal corporation, while a proper party, was not an indispensable party.

The doctrine of *Osborn vs. Bank of United States* must necessarily apply to this case, irrespective of the question whether the Atlantic and Pacific Railroad Company has been served or not and irrespective of the question whether that Company is an indispensable party to this suit. The question whether the Atlantic and Pacific Railroad Company had the right to make the particular contracts evidenced by the bonds involved in this suit forms "an original ingredient" in

this suit as clearly as if the Atlantic and Pacific Railroad Company had actually been made a party to this suit.

The correctness of our position on this point can be tested by considering whether a citizen of Kansas, a holder of bonds of the Atlantic and Pacific Railroad Company, could, as far as the question of jurisdiction is concerned, maintain in the District Court of the United States for that District against this appellee (an inhabitant of that District) a bill in all respects similar to the bill filed by the appellant. It is believed that such an action could be maintained upon the ground that the relief sought against this appellee was in respect of bonds issued by the Atlantic and Pacific Railroad Company under and pursuant to an Act of Congress.

(2) *Since this suit is one arising under the laws of the United States, and since the appellee is an inhabitant of the State and District of Kansas, the appellee was not suable in the Southern District of New York and the fact that diversity of citizenship of the appellant and appellee exists is immaterial.*

Section 51 of the Judicial Code provides:

> "* * * and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded *only* on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In *Macon Grocery Co. vs. Atlantic Coast Line Railroad*, 215 U. S., 501, suit in equity was brought in the Circuit Court of the United States for the Southern District of Georgia, by citizens of that State, against certain railroad corporations, all of which were incorporated under the laws of States other than the State of Georgia. The object of the bill was to restrain the putting into effect by the defendant carriers of pro-

posed advances in rates on fresh meats, grain products, hay and household products, within the territory of what is known as the Southeastern Freight Association. It was held that in determining the right to the relief prayed for, a construction of the Act to Regulate Commerce was essentially involved and therefore the case was one arising under the Constitution and laws of the United States, and that inasmuch as the jurisdiction of the Circuit Court was not invoked *solely* upon the ground of diversity of citizenship, the Circuit Court for the Southern District of Georgia was without jurisdiction of the persons of the defendants, all of whom resided outside of that District. The Court in this case said :

> "The jurisdiction of the Circuit Court not being invoked solely upon the ground of diversity of citizenship, it inevitably follows that, as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of the persons of the defendants."

By the express terms of Section 51 of the Judicial Code above set forth, a suit arising under the laws of the United States cannot be brought against a defendant in any other district than that whereof he is an inhabitant. It follows that the only District Court of the United States in which this suit could be brought is the United States District Court for the District of Kansas.

Conclusion.

It is respectfully submitted that the order of the court below dismissing the bill of complaint herein should be affirmed with costs.

WALKER D. HINES,
Counsel for Appellee.